

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

FLOYD STEVESON MOODY,

Plaintiff,

VS.

PAULETTE FINANDER, Chief Medical Officer, et al.,

Defendants.

CASE NO. 09-CV-0892-LAB (BGS)

REPORT AND RECOMMENDATION TO:

**(1) DENY AS MOOT DEFENDANT REDDY'S MOTION TO DISMISS PURSUANT TO FED.R.CIV.P.
12(b)(6); &
(2) DENY DEFENDANT REDDY'S MOTION TO DISMISS PURSUANT TO FED.R.CIV.P.
12(b)(5) & ALTERNATIVELY QUASH INEFFECTIVE SERVICE**

1. INTRODUCTION

Plaintiff Floyd Moody, a California state prisoner currently incarcerated at Pleasant Valley State Prison (“PVSP”), proceeding pro se, filed this civil rights action pursuant to 42 U.S.C. §1983. On June 4, 2009, Plaintiff filed a First Amended Complaint (“FAC”) against Paulette Finander, K. Ball, Richard Butcher, and Manorama Reddy¹, alleging that he received inadequate medical care in violation of the Eighth Amendment². (Doc. No. 4.)

¹Erroneously sued as Manoram Reddy.

² Plaintiff also asserted a conspiracy claim in his First Amended Complaint, which was dismissed without leave to amend by the Court in an Order dated April 1, 2010. (Doc. No. 38 at 12-13, n.2.)

1 Currently pending before the Court is Defendant Reddy's motion to dismiss the FAC
 2 pursuant to Fed.R.Civ.P. 12(b)(5) for failure to properly serve her with the FAC.³ (Doc. No.
 3 103.) Defendant Reddy also moves to dismiss Plaintiff's conspiracy claims against her
 4 pursuant to Fed.R.Civ.P. 12(b)(6). (*Id.*) Plaintiff filed a response in opposition on February
 5 3, 2011. (Doc. No. 116.) Defendant Reddy filed a reply on February 28, 2011. (Doc. No.
 6 117.)

7 This matter has been referred to the undersigned Magistrate Judge for a Report and
 8 Recommendation (R&R). For the reasons set forth below, the Court **RECOMMENDS** that
 9 Defendant's motion to dismiss pursuant to Rule 12(b)(5) be **DENIED** and alternatively that
 10 ineffective service on Defendant Reddy be quashed. Additionally, because Plaintiff's
 11 conspiracy claims were dismissed without leave to amend on April 1, 2010 (Doc. No. 38 at 12-
 12 13, n.2), the Court **RECOMMENDS** that Defendant's motion to dismiss pursuant to Rule
 13 12(b)(6) be **DENIED AS MOOT**.

14 **II. FACTUAL AND PROCEDURAL BACKGROUND**

15 Plaintiff filed his initial complaint on April 20, 2009, and his First Amended Complaint
 16 ("FAC") on June 4, 2009. (Doc. Nos. 1, 4.) Because Plaintiff was granted *in forma pauperis*
 17 status, service of his FAC was to be carried out by a U.S. marshal at the address Moody
 18 provided for each defendant. (Doc. No. 10.) On July 17, 2009, a summons on the FAC was
 19 issued as to Defendant Reddy and was returned unexecuted on August 13, 2009, indicating that
 20 the defendant was out of the country. (Doc. Nos. 11, 14.) On April 1, 2010, the Court
 21 dismissed Defendant Reddy for Plaintiff's failure to effect service within 120 days pursuant
 22 to Fed.R.Civ.P. 4(m), dismissed Plaintiff's conspiracy claims against all Defendants without
 23 leave to amend, and ordered Defendants Finander, Ball, and Butcher to answer the FAC. (Doc.
 24 No. 38 at 21.)

25 Following the Court's dismissal of Reddy, Plaintiff filed a request to reserve Reddy.

27 ³In her motion, Defendant Reddy makes several arguments concerning the statute of limitations
 28 on Plaintiff's claims against her. In her reply, Defendant Reddy withdraws these arguments in light
 of the Court's order granting Plaintiff an extension of time to serve (Doc. No. 58). (Doc. No. 117 at
 2.)

1 (Doc. No. 43.) On June 9, 2010, the Court granted Plaintiff's request for an extension of time
2 to attempt to serve the FAC and summons upon Defendant Reddy pursuant to Rule 4(m).
3 (Doc. No. 58 at 6-7.) In its order, the Court directed the Clerk of Court to issue an additional
4 "IFP Package," Plaintiff to complete, as accurately and clearly as possible, the new USM
5 Marshal Form 285 provided to him, and the U.S. Marshal to re-attempt service upon Defendant
6 Reddy within 30 days of receiving Plaintiff's new USM Form 285. (*Id.* at 7.) On June 10,
7 2010, a summons was again issued as to Defendant Reddy. (Doc. No. 59.)

8 On June 28, 2010, what appeared to be an executed summons as to Reddy was filed
9 with the clerk. (Doc. No. 61.) On the executed summons, the U.S. Marshal or Deputy certified
10 that at 9:25 a.m. on June 23, 2010, he or she personally served the “individual... at the address
11 shown above,” namely Manoram Reddy, with the summons and FAC. (Doc. No. 61.) On
12 October 8, 2010, Plaintiff filed a request for entry of Clerk’s default against Reddy because
13 Reddy had failed to plead or otherwise respond to the FAC within the time prescribed by the
14 Federal Rules of Civil Procedure. (Doc. No. 75.) On October 8, 2010, the Clerk entered default
15 against Reddy and Plaintiff filed a motion for default judgment against Reddy. (Doc. Nos. 76,
16 77.) On October 27, 2010, an executed summons was filed that was identical to the summons
17 filed on June 28, 2010, except that it instead identified Harris Koenig as the person actually
18 served. (Doc. No. 83.) On November 1, 2010, Defendant Reddy filed a motion to set aside
19 default. (Doc. No. 84.)

20 On December 1, 2010, the undersigned filed a Report and Recommendation to deny
21 Plaintiff's motion for default judgment and to grant Defendant Reddy's motion to set aside the
22 default. (Doc. No. 89.) On January 5, 2011, the Court adopted the Report and
23 Recommendation to set aside the default judgment and found that Defendant Reddy had not
24 been properly served under any provision of law. (Doc. No. 102 at 3.) Defendant Reddy now
25 moves to dismiss the FAC for insufficient service of process.

III. STANDARD OF REVIEW

27 Federal Rule of Civil Procedure 12(b)(5) authorizes a defendant to move for dismissal
28 due to insufficient service of process.. Fed.R.Civ.P. 12(b)(5). “A federal court does not have

1 jurisdiction over a defendant unless the defendant has been served properly [with the summons
 2 and complaint] under Fed.R.Civ.P. 4 [W]ithout substantial compliance with Rule 4 neither
 3 actual notice nor simply naming the defendant in the complaint will provide personal
 4 jurisdiction.”” *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies*, 840 F.2d 685,
 5 688 (9th Cir.1988) (citations omitted); *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir.1986),
 6 amended by, 807 F.2d 1514 (9th Cir.1987); *see also Miss. Publ’g Corp. v. Murphree*, 326 U.S.
 7 439, 444-45 (1946) (“[S]ervice of summons is the procedure by which a court having venue
 8 and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party
 9 served.”). Once service of process is challenged, the “plaintiff[] bear[s] the burden of
 10 establishing that service was valid.” *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir.2004). If
 11 the plaintiff is unable to satisfy its burden of demonstrating effective service, the court has
 12 discretion to either dismiss or retain the action. *See Stevens v. Sec. Pac. Nat'l Bank*, 538 F.2d
 13 1387, 1389 (9th Cir.1976).

14 IV. DISCUSSION

15 Defendant Reddy asserts that she has never been properly served pursuant to
 16 Fed.R.Civ.P. 4 and therefore the FAC should be dismissed as to her. The Court agrees that
 17 Plaintiff has not properly served Defendant Reddy with the summons and FAC.

18 Service of an individual within a judicial district of the United States is governed by
 19 Federal Rule of Civil Procedure 4(e), which states that process my be served by:

20 (1) following state law for serving a summons in an action brought in courts of
 21 general jurisdiction in the state where the district court is located or where
 22 service is made; or
 23 (2) doing any of the following:

- 24 (A) delivering a copy of the summons and of the complaint to the
 individual personally;
- 25 (B) leaving a copy of each at the individual’s dwelling or usual place of
 abode with someone of suitable age and discretion who resides there; or
- 26 (C) delivering a copy of each to an agent authorized by appointment or
 by law to receive service of process.

27 Fed.R.Civ.P. 4(e).

28 As the Court previously found, Defendant Reddy was not properly served pursuant to
 Rule 4(e)(2). (*See Doc. No. 89 at 4; Doc. No. 102 at 3.*) The U.S. Marshal initially filed a
 return of service on June 28, 2010 indicating that Reddy was personally served. The U.S.

1 Marshal then filed a corrected summons with the name of the person actually served, Harris
 2 Koenig. (Doc. No. 83; Doc. No. 84-3, Tsumura Decl. ¶5.) The corrected summons makes
 3 clear that Defendant was not personally served under Rule 4(e)(2)(A).⁴ (*Id.*)

4 The Court also previously found Plaintiff did not properly serve Defendant Reddy under
 5 Rule 4(e)(2)(B). (Doc. No. 102 at 2-3.) The Court noted that Reddy and Koenig worked at
 6 Alvarado Hospital, but there was no appearance that either one lived there. (*Id.* at 3.)
 7 Therefore, the Marshal's service on Koenig at the hospital was not leaving a copy at Reddy's
 8 dwelling or usual place of abode with someone of suitable age and discretion who also resides
 9 there.

10 The Court also previously noted that Koenig was not an "agent authorized by
 11 appointment or law" capable of accepting service on Defendant's behalf pursuant to Rule
 12 4(e)(2)(C). (Doc. No. 89 at 4; Doc. No. 102 at 3.) The "agent" referred to in the rule is not
 13 just an employee or business agent of some kind, rather, he or she must be an agent specifically
 14 designated to receive the service of process. *See Gerritsen v. Escobar Y Cordova*, 721 F.Supp.
 15 253, 256 (C.D.Cal., 1988). Defendant's motion to set aside the default explained that Koenig
 16 is CEO of Alvarado Hospital. (Doc. No. 84-1 at 2; *see also* Doc. No. 83 at 2.) In her
 17 declaration made in connection with the motion to set aside default, Defendant avers that she
 18 is a certified internist at the hospital, she is not an employee of the hospital, she does not
 19 regularly interact with Koenig, and she was never notified by Koenig of the service. (Doc. No.
 20 84-1 at 2; Doc. No. 84-4, Reddy Decl. ¶4.) Plaintiff offers no evidence to suggest that Koenig
 21 and Reddy have an agency relationship of any kind. (Doc. No. 116.) In fact, Reddy declares
 22 that she did not learn of the lawsuit until nine days after default was entered when she was
 23 contacted by a co-defendant's insurance adjuster. (*Id.*)

24 The Court also previously found that service was not proper under Rule 4(e)(1). (Doc.
 25 No. 89 at 4-5.) In California, an individual may be served by delivering the summons and
 26 complaint to someone authorized to accept service on his or her behalf. *See CCP § 416.90.*
 27

28 ⁴The corrected summons includes an attachment of a photocopy of Harris Koenig's business card.

1 Similar to the federal rule, being a person's agent for purposes other than to accept service is
 2 not enough to establish actual or implied authority to accept service of process "even if their
 3 relationship makes it highly probable that defendant will receive actual notice of the lawsuit."
 4 *Summers v. McClanahan* 140 Cal.App.4th 403, 414 (2006). Again, there is no evidence to
 5 suggest that Koenig had been designated by Reddy to receive service on her behalf.

6 Accordingly, the Court finds that Plaintiff has not met his burden of demonstrating valid
 7 service upon Defendant Reddy within the extension of time under Rule 4(m) permitted by the
 8 Court. Plaintiff's arguments that Defendant Reddy has actual knowledge of the allegations in
 9 the FAC and this lawsuit is insufficient to defeat a motion pursuant to Rule 12(b)(5). *Direct*
 10 *Mail Specialists, Inc.*, 840 F.2d at 688.

11 Upon a finding that service was not proper, the court in its discretion may dismiss the
 12 action or quash service of process. *Stevens*, 538 F.2d AT 1389. Under Rule 4(m), the court
 13 must extend the time for service if the plaintiff shows good cause for the failure to timely serve
 14 and has discretion to either dismiss the action or extend time for service even if plaintiff cannot
 15 establish good cause. Fed.R.Civ.P. 4(m). The Court finds there is a good cause for the failure
 16 to serve Defendant Reddy properly and within the time permitted by the Court. Plaintiff
 17 provided the U.S. Marshal with Defendant's work address and he reasonably relied on the
 18 initial return of service indicating that Defendant Reddy was personally served by the Marshal
 19 on June 23, 2010. (Doc. No. 61.) Plaintiff had until July 9, 2010 to return the USM Marshal
 20 Form 285 to the U.S. Marshal, and the Marshal had 30 days from the receipt of Plaintiff's
 21 USM Form 285 to re-attempt service of Defendant Reddy. (Doc. No. 58 at 7.) At the latest,
 22 the U.S. Marshal had until August 8, 2010 to serve Defendant Reddy. Plaintiff reasonably
 23 believed service was made within this time period and had no basis to believe service was not
 24 properly and timely effectuated until the corrected summons was filed on October 27, 2010.
 25 (Doc. No. 83.) The Court also notes there is no reason to believe Plaintiff could not properly
 26 execute service upon Defendant Reddy by personally serving her. Therefore, the Court
 27 recommends denying Defendant Reddy's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(5),
 28 quashing the ineffective service of process upon Defendant Reddy, and allowing Plaintiff an

1 extension of time under Rule 4(m) to attempt to effectuate proper service on Defendant Reddy.

2 **VI. Conclusion and Recommendation**

3 For the reasons set forth above, the undersigned Magistrate Judge recommends:

- 4 1. Defendant Reddy's motion to dismiss Plaintiff's conspiracy claims pursuant to
5 Fed.R.Civ.P. 12(b)(6) be **DENIED AS MOOT**;
- 6 2. Defendant Reddy's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(5) be
7 **DENIED**, and instead the ineffective service on Defendant Reddy be
8 **QUASHED**; and
- 9 3. Granting Plaintiff an extension of time under Fed.R.Civ.P. 4(m) to effectuate
10 proper service on Defendant Reddy and directing the U.S. Marshal, pursuant to
11 Fed.R.Civ.P. 4(c)(3), (m) and 28 U.S.C. §1915(d), to re-attempt service of the
12 FAC and summons upon Defendant Reddy within 30 days of the date of the
13 District Judge's Order on this Report and Recommendation.

14 This Report and Recommendation of the undersigned Magistrate Judge is submitted to
15 the United States District Judge assigned to this case, pursuant to 28 U.S.C. § 636 (b)(1).

16 **IT IS HEREBY ORDERED** that no later than September 9, 2011, any party to this
17 action may file written objections with the Court and serve a copy on all parties. The
18 document should be captioned "Objections to Report and Recommendation."

19 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the
20 Court and served on all parties no later than September 23, 2011.

21 **IT IS SO ORDERED.**

22 DATED: August 26, 2011

23 
24 **BERNARD G. SKOMAL**
25 United States Magistrate Judge
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